



by **LESLIE STEVEN MARKS** and **NICHOLAS A. MERKIN**

WAKE-UP CALL

Construction defect statutes of repose should be interpreted broadly, despite the seeming restrictions of the statutory language

In recent years consumer demand for housing in California has intensified and led to a marked increase in housing construction. To meet this growing demand, and in an attempt to maximize profits, many developers chose an assembly line form of home manufacturing, even with the potential sacrifice in quality. As a result, much of California's new housing inventory was defectively constructed, igniting myriad construction defect lawsuits against developers and contractors.

Many of these cases have been resolved. Others will be brought in the near future. Those contemplating future litigation, however, do not have the luxury of unlimited time to initiate their claims. Construction

defect actions, as with virtually all civil litigation claims, must be brought within a specific time period mandated by the California Legislature.¹ Consequently, a viable cause of action for construction defects often turns not only on the merits of the claim but also on whether the lawsuit is brought within the statutory time limits. If a lawsuit is brought

Leslie Steven Marks is a litigation partner with Wolf, Rifkin, Shapiro & Schulman, LLP, where he specializes in real estate and construction litigation. He also serves as an arbitrator for the American Arbitration Association. Nicholas A. Merkin is an associate in the litigation department of Wolf, Rifkin, where he focuses on business disputes and real estate litigation.

merely one day late, the defendant developer will have an absolute defense to the claim, and the plaintiff—even one with an otherwise factually and legally strong case against the developer—may be left without a remedy.

Understanding the various time limitations for bringing construction defect actions is crucial to plaintiffs and defendants. Unfortunately, several aspects of these time limitations are confusing and require clarification because of ambiguities contained in what is commonly known as the “control exception.”²

The California Legislature has imposed different statutes of repose on construction defect cases depending on whether the defects in question are considered “patent”—those that are apparent upon reasonable inspection³—or “latent”—those that do not present themselves until after the completion of construction.⁴ Code of Civil Procedure Section 337.1 applies to actions for patent construction defects and limits such lawsuits to four years after substantial completion of the construction. Code of Civil Procedure Section 337.15, in contrast, provides for a 10-year statute of repose from the time of substantial completion of construction for lawsuits arising out of latent construction defects.

Both Sections 337.1 and 337.15, however, carve out identical exceptions to their respective time limitations. Each is referred to as the control exception. According to the exception, the time-related defense to liability prescribed in the statutes cannot be asserted by “any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.”⁵ The control exception, in other words, bars certain parties under certain conditions from using the statutes of repose of Sections 337.1 and 337.15 as a defense in a construction defect lawsuit.

Even a cursory reading of the control exception reveals the difficulties in comprehending its scope and application. What exactly constitutes “actual possession or the control”? Is control over certain aspects—but not all aspects—of a development enough to fall under the control exception? At what point does “possession or the control” have to be assumed by a developer? What if an entity had “possession or the control” of a development during construction but relinquished it after completion of the construction?

What persons or entities fall into the categories of “owner, tenant or otherwise”? What about a governmental body, property management company, or a condominium homeowners’ association? Does being in “possession or the control” toll the applicable time limitations on actions? If a contrac-

tor builds and owns a development for more than 10 years before selling it, does the applicable 10-year or 4-year time limitation begin to run at the time of the plaintiff’s purchase of the development or has the time limitation already run?

Legislative Intent

One approach to answering these questions is to ask why the legislature thought the control exception was necessary. It is important to discern for whom the control exception was designed to benefit or protect.

In *Eden v. Van Tyne*,⁶ the court of appeal neatly summarizes the statutory intent of Section 337.15 (and, by extension, Section 337.1) and describes the legislative rationale for providing this type of defense to those in the construction industry:

There is a reason for treating persons in possession differently from the contractor and architect. In footnote 2 of the above case [*Regents of the University of California v. Hartford Accident and Indemnity Company*], the court states: “A contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise.” On the other hand, one who owns the property or controls it at the time of the accident (i.e., at the time the defect constitutes the proximate cause of the damage or injury) is likely to have insurance.⁷

According to the *Eden* court, indefinite prospective liability for construction defects would make the construction business financially untenable. It is for this reason that the legislature enacted the various time limitations on actions against contractors and builders.

But why did the legislature also take away the protections of Section 337.1 and Section 337.15 from those in “possession or the control”? By passing the control exception, the legislature limited the scope of the Section 337.1 and Section 337.15 time limitation defenses. To this question, *Eden* also provides an answer. Entities that are in “possession or the control” of developed real property most probably have insurance. Consequently, there is no need to protect these entities from indefinite prospective liability, because this liability presumably will be borne by an insurance company. Aggrieved property owners will be able to get their relief from a member of the insurance industry, which apparently—at least in the legislature’s conception—is better suited to carry the costs of this type of liability. From the *Eden* perspective, the statutory scheme might

even be viewed as favoring consumers by making sure that potential defendants have deep enough pockets to pay a judgment entered against them. This reasoning became an important guide for California courts considering the proper application of Sections 337.1 and 337.15.

The time limitations on most tort claims run from the time the injury in question is discovered by the potential plaintiff. Sections 337.15 and 337.1, however, operate differently in that their applicable time limitations run from “substantial completion” of the construction rather than from the time the injured party knew, or should have known, of the injury. This difference distinguishes a statute of repose from the more typical statute of limitation.

In *Inco Development Corporation v. Superior Court*, the court of appeal further delineated the hallmarks of these two types of statutes setting forth time periods within which an action can be brought:

Cal. Code Civ. Proc. §337.15 has characteristics of a statute of repose. It is not dependent upon traditional concepts of accrual of a claim, but is tied to an independent, objectively determined and verifiable event, i.e., the date of substantial completion of the improvement. That date may very well predate the time when a potential plaintiff purchases the property. A suit to recover for a construction defect generally is subject to limitations periods of three or four years, depending on whether the theory is breach of warranty or tortious injury to property. Unlike these statutes of limitation which begin to run only when the defect was or should have reasonably been discovered, the 10-year period in Cal. Code Civ. Proc. §337.15 imposes an absolute requirement that a lawsuit to recover damages for latent defects be brought within 10 years of substantial completion of the construction, whether or not the defect was or even could have been discovered within that period.⁸

Therefore, under California law, Section 337.15 is a statute of repose rather than a statute of limitation. Consequently, the 10-year time limitation is an absolute bar that is not dependent on when a latent construction defect is discovered or when the property in question is sold by the developer. Furthermore, it follows that the fact that a developer is in “possession or the control” of a development does not toll Section 337.15 during the time the developer possesses or controls the property.

Similar case law in connection with Section 337.1 provides that this statute is

also deemed a statute of repose rather than one of limitation.⁹ As such, the date of discovery of a patent construction defect is likewise irrelevant to the operation of the statute. As with Section 337.15, the fact that a developer is in “possession or the control” of a development does not toll this provision during the time the developer possesses or controls the property.

Interpreting the Control Exception

For the control exception to apply, the “possession” and “control” must occur “at the time any deficiency in the improvement con-

ble, contrary to representations made to them by the sellers, and that the residence had suffered substantial structural distress requiring considerable reconstruction of the property. The builder and the soils engineer moved for summary judgment on the grounds that the causes of action against them were barred by the 10-year statute of repose in Section 337.15.¹¹

In response, the plaintiffs argued that Section 337.15(e) barred the contractor—and named others—from using the statute of repose defense because they were in possession or control of the premises at the time the

reasoning because the party in possession or control is not only best situated to identify a construction defect and remedy it before the filing of a lawsuit but also most likely to cover up the defect. To put it even more starkly, without the control exception a party in “possession or the control” of a development that is aware of a major construction defect could simply elect to withhold this information and run out the clock by failing to relinquish control over the development until the statutory time limit had expired.

The more recent case of *Magnuson-Hoyt v. County of Contra Costa*¹³ deals with the

To put it even more starkly, without the control exception a party in “possession or the control” of a development that is aware of a major construction defect could simply elect to withhold this information and run out the clock by failing to relinquish control over the development until the statutory time limit had expired.

stitutes the proximate cause for which it is proposed to bring an action.” Reading this portion of the statute certainly seems to indicate that if a party is in possession or control when it caused the defect, it cannot plead the statute of repose defense for construction defect actions. One can even imagine a valid public policy basis for this interpretation: It will create a greater incentive for developers to monitor builders and ensure that the work they perform is free from defect. According to this approach, once a party in possession or control—presumably the party with the best chance at detecting and preventing a construction defect—allows a construction defect to go unrepaired under its supervision, it is forever liable for the consequences.

This interpretation of the control exception, however, defies logic. Such an interpretation would eviscerate the statutes, as almost all parties involved in the creation of a development can be said to have been at one time in possession or control of the development.

This issue was at the heart of the court’s decision in the *Eden*¹⁰ case. The plaintiffs—purchasers of a residential property—filed a complaint for rescission and damages against the sellers of the property and for damages against the builder and a soils engineer. According to the plaintiffs, the sellers had concealed the fact that a substantial section of a patio wall had failed and toppled down a slope. After investigating the wall failure, the plaintiffs discovered that the land was unsta-

defective latent condition was designed, installed, or built into the improvement. Under the plaintiffs’ reading of Section 337.15(e), if a party was ever in possession or control of an improvement, it could never plead a Section 337.15 defense, no matter how much time had elapsed between the discovery of the defect and the party’s relinquishment of possession or control.

The court of appeal, however, rejected the plaintiffs’ argument, concluding that such an interpretation “would defeat the intent of the statute.” All contractors, developers, and the like are in control of an improvement at some stage of its development. Thus the plaintiffs’ interpretation of subdivision (e) would wholly deny the intent of the statute. Indeed, the court found that the argument by the plaintiffs stretches the language of the subdivision beyond the point at which it can be validly applied.¹²

Therefore, despite the language of the statute, the *Eden* court found that in order to determine whether the control exception applies to a certain party, it is not only relevant who was in control at the time the defect was created but also who was in control at the time it was discovered. Furthermore, although the *Eden* court never mentions this specifically, it is reasonable for parties in possession or control at the time a lawsuit is filed to be excepted from the time limitations defenses by the control exception. This principle can be inferred from the *Eden* court’s

question of what classes of parties may employ the statute of repose defense. The plaintiff-property owner alleged that landslide damage to her property in 1986 was caused by the manner in which an adjoining public street was constructed in 1968. The complaint alleged that the county substantially participated in the design and construction of the street. The county had no responsibility for maintenance of the street after June 1977, and the action was filed in August 1987. Thus the county pled a defense based on Section 337.15.¹⁴

In an attempt to make use of Section 337.15’s legislative rationale in order to defeat its application in the lawsuit, the plaintiff offered two arguments in response. First, the statute does not mention public agencies but refers only to a “person” developing real property. Second, the legislative rationale of the law was to protect “contractors and other professionals and tradespeople in the construction industry,” not government entities.¹⁵

The court of appeal rejected the plaintiffs’ contentions in full, finding the language of the statute to be broad enough to encompass government entities:

Section 337.15 clearly and unambiguously expresses a legislative intent to put a 10-year limit on latent deficiency liability exposure for “any person” performing certain activities in making improvements to real property. Among the activities covered by

the statute are performing or furnishing the design or specifications of the improvement. There is nothing in the words of the statute that suggests a public or governmental entity which has engaged in one of the specified activities is precluded from asserting the statute as a defense. Consequently, resort to the legislative history of section 337.15 is unnecessary. We therefore hold that the provisions of section 337.15 can apply to claims against governmental and public entities.¹⁶

The *Magnuson-Hoyt* court never directly addressed the issue of why the legislature would have sought to protect a party from outside the construction industry that would not share a builder's burden to maintain large capital reserves. Nevertheless, the court makes clear that the statutes of repose regarding construction defects should be read broadly to shield "any person" from liability who might otherwise be excluded from the defense if considering solely the legislative purpose expressed by *Eden*—namely, the protection of members of the building industry. Courts analyzing the appropriateness of applying the control exception to a given situation must keep in mind *Magnuson-Hoyt's* broad reading of the applicable statute of repose to include nondeveloper parties—a result the legislature may never have intended.

Interestingly, in the spring of 1998, Assembly Bill 2631 (Baugh) was proposed to limit the applicability of the Section 337.15(e) exclusion to government entities. In accordance with this proposal, the possession/control exclusion of subdivision (e) would be made applicable only to government entities that had actual knowledge of the latent deficiency in question and unreasonably failed to take action to cure it. Under this bill, a government agency, even one in possession or control of an improvement, could plead the 10-year statute of repose defense, except in situations in which it knew of and unreasonably ignored a defect. Although the measure ultimately failed to become law, it reveals some additional legislative sympathy toward expanding the statutes of repose in Sections 337.1 and 337.15 beyond the construction industry, notwithstanding the original intent of the legislature.

Assessing Control

In *Gaggero v. County of San Diego*,¹⁷ the court of appeal addressed the issue of how much control gives rise to the Section 337.15(e) exception to the statute of repose. The County of San Diego owned and operated a landfill until it was sold in 1969. Subsidence later caused major damage to nursery structures on the property, and the subsequent owners alleged that the decom-

position of material in the landfill had produced methane gas, which in turn created void pockets in areas beneath the landfill covering. In 2000, they brought an action against the County of San Diego alleging negligence in the manner in which the landfill was planned, designed, owned, occupied, and maintained. The county moved for summary judgment, contending that the action was time-barred.

The plaintiffs countered, arguing that because the county installed methane monitoring equipment on the landfill in 1988, the county was in actual possession or control of the landfill within the meaning of the exception to Section 337.15.¹⁸ The court disagreed with the plaintiffs and held that they could not take advantage of the Section 337.15(e) exception. In doing so, the court reiterated a policy principle:

First, the class of persons to whom builders may be liable is larger than the class to which owners may be liable.... Second, a builder may be liable for construction defects under various legal theories—contract, warranty, negligence, and perhaps strict liability in tort. Landowner liability for such defects, on the other hand, typically lies only in tort, unless the landowner is a lessor, in which case he is liable only for events occurring while the tenant is in possession.... Third, landowners can ordinarily avoid liability by taking adequate care of their land and structures.... The builder has no such control over his product after relinquishing it to the landowner.¹⁹

The court concluded by noting that "[r]the county's monitoring activity did not bring it within the rationale of the exception. The monitoring did not narrow the scope of potential claimants nor the theories upon which the county might be held liable. Rather, quite to the contrary, the monitoring arguably expanded the scope of the county's potential liability."²⁰ In accordance with this reasoning, which paid special attention to the legislative intent behind the statute of repose, the court found that the county's mere monitoring of methane on the site did not constitute enough "possession" or "control" to give rise to the subsection (e) exclusion.

The decision in *Gaggero* is narrowly written, addressing only the issue of whether monitoring methane meets the requisite level of "possession or the control" rather than the broader issue of the elements constituting possession or control. Thus it is difficult to derive a broad lesson from *Gaggero*. Clearly future courts faced with analyzing whether a party has the minimal level of possession or control will have to consider at least some precedent for the idea that, in some cases,

Bell Anderson & Sanders LLC

Real Estate Damage Economics

APPRAISAL/VALUATION
■
DIMINUTION IN VALUE STUDIES
■
CONSULTING

Construction Defects
Geotechnical Issues
Environmental Contamination
Eminent Domain
Natural Disasters
Proximity Studies
Detrimental Conditions

Randall Bell, MAI
Orell Anderson, MAI
Michael V. Sanders, MAI, SRA

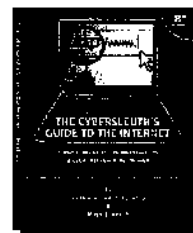
Bell Anderson & Sanders, LLC
496 Broadway
Laguna Beach, California 92651
(949) 497-7600 Fax (949) 497-7601
RealEstateDamages.com

Don't Just Look For
Information on the
Internet...Find it!

The Cybersleuth's Guide to the Internet

by
Carole A. Levitt, JD, MLS
&

Mark E. Rosch
(frequent contributors to the
Computer Counselor column)



- Updated
- Revised
- Expanded

Because search
engines are only
the beginning.

For more information about
this book or to order
your own copy, see
www.netforlawyers.com/lal.

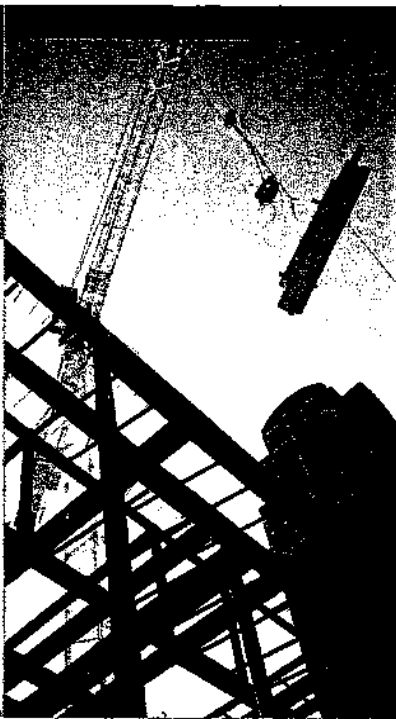
To order your copy by phone,
call 310/559-1632.

Big Projects. Big Cases.

Holland & Knight —
EPA Commitment to
Construction Law

- Walt Disney Concert Hall -
Los Angeles
- Oakland Bay Bridge - *San Francisco*
- Los Angeles Aqueduct Filtration
Plant - *Los Angeles*
- Tampa Bay Water Desalination
Facility - *Tampa*
- Central Artery/Tunnel - *Boston*
- Ronald Reagan Federal Office
Building - *Washington, D.C.*
- Royal Palm Resort (Largest U.S.
Earthquake Collapse) - *Guam*

Bob Levy
Los Angeles, CA
213 993 2404

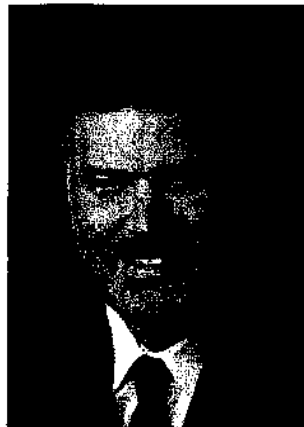


Bob Levy

Los Angeles, CA
213 993 2404

KENNETH C. GIBBS

Mediator



*Serving the Construction Community for
more than 30 years*

1601 Cloverfield Blvd., Suite 370-S
Santa Monica, California 90404
(310) 392-3044
kgibbs@jamsadr.com

mere supervision over one aspect of a development by an entity is not enough to deem the entity in control of the development for other matters.

In contrast to *Gaggero*, the court in *Leaf v. City of San Mateo*²¹ found that responsibility for storm and sanitary sewer easements constituted enough possession or control to permit the invocation of the control exception and exclude the City of San Mateo from asserting a defense based on the statute of repose. In *Leaf*, the owners of a duplex brought an action for inverse condemnation against the city arising from subsidence damage alleged to be the result of the city's defective sewage and drainage systems. The plaintiffs filed the action against the city on January 28, 1977. The trial court granted summary judgment in favor of the city on the ground that the action was brought more than 10 years after the date of completion of the duplex and thus fell under the ambit of Section 337.15. The court of appeal reversed:

The purpose of the ten-year statute is to protect developers of real estate against liability extending indefinitely into the future. [Citations omitted.] Section 337.15 does not protect persons in actual possession or control, as owner or otherwise, of the offending property at the time of the proximate cause of the injury. [Citations omitted.] Defendant City was in possession and control of the storm and sanitary sewer easements on and near plaintiffs' property. Therefore, City of San Mateo was not within the protected class, specifically developers, which was intended by this statute.²²

According to the *Leaf* decision, it was not even necessary for a party to be in control of the damaged property. Mere possession or control over the cause of the defect was enough to bar the protections of Section 337.15 and invoke the control exception.

Although *Leaf* is as narrowly drawn as *Gaggero*, a consideration of the decisions in tandem suggests the proper parameters for addressing the question of how much control is enough to qualify for the control exception. In *Gaggero*, the defendant's supervisory responsibilities did not give it the information necessary or the authority to identify or remedy the construction defect that was the subject of the underlying litigation. No matter how diligently the County of San Diego monitored the methane at the site, it would not have discovered or been in a position to fix the alleged soil subsidence problem. As a result, excepting the County of San Diego from employing the statutory time limitations defense would seem unfair.

Unlike the *Gaggero* court's analysis regarding the County of San Diego, the *Leaf* court

found that the responsibility of the defendant, the City of San Mateo, was to maintain the city's sewage and drainage systems—the very subject of the lawsuit. The city, therefore, was uniquely positioned to have discovered the purportedly defective sewage and drainage systems during the years leading up to the lawsuit and would have been best able to remedy any defects. Thus the City of San Mateo should be barred from using the applicable statute of repose as a complete defense to the action.

Although the case law and legislative history pertaining to Section 337.1 and Section 337.15 are scant, the information available allows for the extraction of several principles that can guide the judiciary's interpretation of these statutes. First, the applicable statutes of repose are designed to avoid the indefinite prospective liability for construction defects that would make the construction business financially untenable. The control exception is designed to except entities that are in "possession or the control" of a development from the protections of the statutory time limitations because these types of entities most probably have insurance to provide for their liabilities. Thus the statutory rationale should not apply to them.

Second, despite the statutory language that the relevant period for possession and

control to determine the applicability of the control exception is "at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action," the proper question is who is in possession or control at the time the suit is filed. Any contrary interpretation would eviscerate the purpose of the statute, as all developer parties were in possession or control at some point during the construction. The party in possession or control at the time the defect is discovered is best situated to identify a construction defect and remedy it before the filing of a lawsuit—and is most likely to conceal the defect.

Third, the construction defect-related statutes of repose should be read broadly to shield "any person" from liability, not just developer parties—despite contrary rationales for the statutory language.

Fourth, a party that was well-positioned to discover and remedy a construction defect as a result of its degree of control or supervision over a development should be barred by the control exception from using the statutory time limitations as a defense.

Last, when interpreting the control exception and the statutory time limitations on construction defect actions, it is important to bear in mind that Sections 337.1 and 337.15 are statutes of repose under California law. As

such, these statutes are not tolled during the period that a developer is in possession or control of a development. ■

¹ See text, *infra*.

² CODE CIV. PROC. §§337.1(d), 337.15(e). See text, *infra*.

³ See CODE CIV. PROC. §337.1(c).

⁴ See, e.g., *Acme Galvanizing Co. v. Fireman's Fund Ins. Co.*, 221 Cal. App. 3d 170 (1990).

⁵ CODE CIV. PROC. §§337.1(d), 337.15(e).

⁶ *Eden v. Van Tyne*, 83 Cal. App. 3d 879 (1978).

⁷ *Id.* at 886 (quoting *Regents of the Univ. of Cal. v. Hartford Accident & Indem. Co.*, 21 Cal. 3d 624 (1978)).

⁸ *Inco Dev. Corp. v. Superior Court*, 131 Cal. App. 4th 1014, 1020 (2005).

⁹ *Fireman's Fund Ins. Co. v. Sparks Constr., Inc.*, 114 Cal. App. 4th 1135, 1151 (2004).

¹⁰ *Eden*, 83 Cal. App. 3d 879.

¹¹ *Id.* at 885-86.

¹² *Id.*

¹³ *Magnuson-Hoyt v. County of Contra Costa*, 228 Cal. App. 3d 139 (1991).

¹⁴ *Id.* at 144.

¹⁵ *Id.* at 142.

¹⁶ *Id.* at 144.

¹⁷ *Gaggero v. County of San Diego*, 124 Cal. App. 4th 609 (2004).

¹⁸ *Id.* at 618.

¹⁹ *Id.* at 618-19 (citing *Barnhouse v. City of Pinole*, 133 Cal. App. 3d 171, 182-83 (1982)).

²⁰ *Id.* at 619.

²¹ *Leaf v. City of San Mateo*, 104 Cal. App. 3d 398 (1980).

²² *Id.* at 714.



A wider perspective:

What the legal community expects from a law school devoted to the big picture.

Creative, versatile graduates with panoramic vision for today's complex legal challenges.

CALIFORNIA WESTERN
SCHOOL OF LAW | San Diego

What law school ought to be.™

www.CaliforniaWestern.edu